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In the Supreme Court of the United States

OCTOBER TERM, 1975

MICHAEL TROISE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the trial court erred in refusing to compel the government to disclose the identity of an informant.

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possessing cocaine with the intent to distribute it and of distributing cocaine, in violation of 21 U.S.C. 841(a)(1), and of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846. He

was sentenced to concurrent terms of five years' imprisonment on each count, to be followed by a three-year special parole term. The court of appeals affirmed *per curiam* (Pet. App. A).

The evidence at trial revealed that on August 15, 1973, Agent Charles Brown of the Drug Enforcement Administration (DEA) and a confidential informant met Donald Gould at the Miami Shores Quality Cleaners.[1] Brown and Gould negotiated the purchase of one pound of cocaine, delivery of which was to take place the next day (Tr. 98-99, 101-102). On August 16, 1973, Brown and the informant met Gould in a restaurant, and Gould advised them "that his connection for the one pound of cocaine had an office on 79th Street" in Miami, Florida, and that after his meeting with his source he would call Brown to complete the transaction (Tr. 102-103, 146, 165). As Gould left the restaurant, DEA agents followed him (Tr. 147, 165-166). Gould went directly to an office building on 79th Street in Miami, where he remained for approximately five minutes before returning to the Miami Shores Quality Cleaners (Tr. 147, 166).

A few hours later, petitioner spoke with Gould outside the cleaners, and then drove to the 79th Street office building where Gould had gone after having left Agent Brown at the restaurant (Tr. 148-150, 167). Shortly thereafter, Brown and the informant went to the cleaners, at which time Gould informed them that

[1] Gould was charged with petitioner but pleaded guilty to the conspiracy count prior to trial. The substantive counts against Gould were dismissed.

his connection would arrive at 6:30 p.m. (Tr. 104-106, 150, 167, 179). At approximately 6:30 p.m., petitioner returned to the cleaners, had a brief conversation with Gould outside the store, and then parked his car across the street in a parking lot adjoining a restaurant (Tr. 108-109, 150-151, 167-168, 179-180). Gould stated that the driver of the car was his source for the cocaine (Tr. 108-109). Although petitioner entered the restaurant without a sport coat, Agent Brown, who was standing in the front of the cleaners with Gould and the informant, saw petitioner emerge from the restaurant and walk towards the cleaners with a sport coat over his arm (Tr. 109-110, 136-139, 151, 168-169, 180-181). When petitioner entered the cleaners, he laid the coat on the counter and stated: "[h]ere's my laundry; here's my cleaning" (Tr. 110-111, 127). Gould took the coat to the back room and removed a pound of cocaine from one of the pockets. Brown took the cocaine and gave Gould $13,500 for it (Tr. 111-112). As Brown and the informant left the cleaners, petitioner said to Brown: "I am sorry I held you up" (Tr. 113). Approximately two minutes later, petitioner left the cleaners with the coat (Tr. 152, 170, 181).

Petitioner's contention that the government should have been required to disclose the informant's identity is without merit. In rejecting this contention, the court of appeals applied the test announced by this Court in *Roviaro* v. *United States*, 353 U.S. 53. In *Roviaro*, this Court held that the public interests served by withholding the identity of informants

must be balanced against the right of criminal defendants to a fair trial and that "[w]hether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." 353 U.S. at 62. At no time has petitioner offered a credible theory suggesting how disclosure of the informant's identity might have proven useful to his defense or why disclosure should otherwise have been required.

Petitioner first moved for disclosure of the informant's identity approximately eight months after his case had been set for trial. He renewed the motion at the time of trial, contending that the informant might contradict Agent Brown's anticipated testimony that petitioner had stated upon delivering the cocaine, "I am sorry I held you people up" (Tr. 6). Petitioner now claims that the informant "might have testified to petitioner's possible lack of knowledge of the contents of the package in the sport coat that [petitioner] picked up across the street from the cleaners and delivered to the cleaners" (Pet. 11). These contentions, which were not supported by evidence at the *in camera* hearing held to consider petitioner's motion seeking disclosure of the informant's identity or by any evidence introduced at trial, fall far short of the showing required to support an order compelling disclosure.[2]

[2] The trial court stated in denying petitioner's motion for disclosure of the informant's identity that it was doing so

Petitioner did not raise an entrapment defense at trial, and there is thus no issue in this case of petitioner's having been misled by the informant or forced into committing the offenses with which he was charged through contacts with the informant outside of the presence of Agent Brown (see, *e.g.*, *Lopez-Hernandez* v. *United States*, 394 F. 2d 820, 821 (C.A. 9)). Unlike the situation in *Roviaro*, moreover, petitioner does not claim that the informant dealt with him directly and that the government agents simply received information second-hand from the informant (see, *e.g.*, *Rugendorf* v. *United States*, 376 U.S. 528, 534). In fact, the informant's role in the transaction involving petitioner was limited to introducing Agent Brown to co-defendant Gould and accompanying Brown during the subsequent negotiations and sale. Finally, petitioner did not controvert at trial any of the evidence presented by the government (see, *e.g.*, *United States* v. *Martinez*, 487 F. 2d 973, 975 (C.A. 10); *United States* v. *Miramon*, 443 F. 2d 361, 362 (C.A. 9)), or offer any evidence tending to impeach Agent Brown's credibility (see *Rovario* v. *United States*, *supra*, 353 U.S. at 64-65).[3]

"upon the basis that the record * * * indicates that the confidential informant could not be located even if the name were given" (Tr. 23).

[3] Petitioner's reliance upon *McLawhorn* v. *North Carolina*, 484 F. 2d 1 (C.A. 4), is misplaced. The informant in *McLawhorn* had initially suggested to a police officer that the defendant was a seller of narcotics, made the initial contact with the defendant and introduced him to undercover policemen, and actually received the narcotics from defendant and

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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paid part of the purchase price. In contrast, the informant in the present case neither negotiated the sale of cocaine nor dealt directly with petitioner.

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